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UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF CALIFORNIA

DANIEL COX, JOSEPH M. LYNCH, and
NICOLE HALL, on behalf of themselves and
all others similarly situated,

Plaintiffs,

v.

CLARUS MARKETING GROUP, LLC, a
Connecticut corporation; PROVIDE
COMMERCE, INC., a Delaware corporation;
and DOES 1 through 50, inclusive,

Defendants.

CASE NO.: 11-CV-02711-H (RBB)

CLASS ACTION

**MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF
UNOPPOSED MOTION FOR (1)
PRELIMINARY APPROVAL OF CLASS
ACTION SETTLEMENT,
(2) PROVISIONAL CLASS
CERTIFICATION, (3) DISTRIBUTION
OF CLASS NOTICE, AND
(4) SCHEDULING OF FAIRNESS
HEARING**

Date: November 13, 2012

Time: 10:30 a.m.

Judge: Hon. Marilyn L. Huff

Courtroom: 13

TABLE OF CONTENTS

I.	INTRODUCTION.....	1
II.	STATEMENT OF THE FACTS.....	2
A.	Plaintiffs’ Allegations.....	2
B.	Relevant Procedural History.....	4
C.	Plaintiffs’ Discovery Efforts.....	5
D.	Mediation and Settlement Negotiations.	6
III.	THE SETTLEMENT TERMS.....	7
A.	The Settlement Class and Subclass.	7
B.	Relief to the Class and Subclass.....	8
C.	Class Representatives’ Incentive Payments.	9
D.	Attorneys’ Fees and Costs.	10
E.	Settlement Administration and Notice.	10
F.	Objections and Opt-Out Procedures.....	11
IV.	ANALYSIS	12
A.	The Law Favors Settlement.....	12
B.	The Preliminary Approval Process.....	13

1	C. The Settlement Should Be Preliminarily Approved.....	14
2	1. The Settlement Enjoys a Presumption of Fairness Because the Negotiations Were	
3	Conducted at Arm’s Length.	14
4	2. Counsel’s Discovery Efforts.....	15
5	3. The Settlement Suffers From No Obvious Deficiencies.	15
6	4. The Incentive Awards Are Reasonable.	15
7	5. The Attorneys’ Fees And Costs Are Reasonable.....	16
8	6. The Proponents of the Settlement Are Experienced in Similar Litigation.	18
9	7. The Proposed Settlement Class Warrants Certification.....	18
10	D. The Proposed Form And Method Of Class Notice Satisfies Due Process.	22
11	V. CONCLUSION	23

TABLE OF AUTHORITIES

CASES

<i>Alberto v. GMRI, Inc.</i> 252 F.R.D. 652 (E.D. Cal. 2008).....	12
<i>Amchem Prods., Inc. v. Windsor</i> 521 U.S. 591 (1997)	12, 18
<i>Baxter v. Intelius</i> No. 09-1031 SACV-AG (MLGx), 2010 WL 3791487 (C.D. Cal. Sept. 16, 2010)	2
<i>Berry v. Webloyalty.com, Inc.</i> No. 10-CV-1358-H (CAB), 2011 WL 1375665 (S.D. Cal. Apr. 11, 2011)	2
<i>Bott v. Vistaprint USA, Inc.</i> 392 Fed. Appx. 327 (5th Cir. Tex. 2010)	2
<i>Browning v. Yahoo! Inc.</i> No. C04-01463 HRL, 2007 WL 4105971 (N.D. Cal. Nov. 16, 2007)	21
<i>Fernandez v. Victoria Secret Stores, LLC</i> No. CV 06-04149 MMM (SHx), 2008 WL 8150856 (C.D. Cal. Jul. 21, 2008)	17
<i>Ferrington v. McAfee, Inc.</i> No. 10-CV-01455-LHK, 2010 WL 3910169 (N.D. Cal. Oct. 5, 2010)	2
<i>Gautreaux v. Pierce</i> 690 F.2d 616 (7th Cir.1982).....	12
<i>Gen. Tel. Co. of the Nw., Inc. v. EEOC</i> 446 U.S. 318 (1980)	19
<i>Hanlon v. Chrysler Corp.</i> 150 F.3d 1011 (9th Cir. 1998).....	16, 19, 20
<i>In re Activision Sec. Litig.</i> 723 F. Supp. 1373 (N.D. Cal. 1989).....	16
<i>In re EasySaver Rewards Litig.</i> 737 F. Supp. 2d 1159 (S.D. Cal. Aug. 13, 2010)	2
<i>In Re HP Laser Printer Litig.</i> No. SACV 07-0667 AG (RNBx), 2011 WL 3861703 (C.D. Cal. Aug 31, 2011).....	13
<i>In re Pac. Enter. Sec. Litig.</i> 47 F.3d 373 (9th Cir. 1995).....	16
<i>In re Portal Software, Inc. Sec. Litig.</i> No. C-03-5138 VRW, 2007 WL 1991529 (N.D. Cal. Jun. 30, 2007).....	18

1	<i>In re Syncor ERISA Litig.</i>	
	516 F.3d 1095 (9th Cir. 2008)	11
2	<i>In re TFT-LCD (Flat Panel) Antitrust Litig.</i>	
3	No. 3:07-md-1827 SI, 2011 WL 7575003 (N.D. Cal. Dec. 27, 2011)	15
4	<i>In re VistaPrint Corp. Mktg. and Sales Practices Litig.</i>	
	MDL No. 4:08-md-1994, 2009 WL 2884727 (S.D. Tex. Aug. 31, 2009)	2
5	<i>In re Wachovia Corp. “Pick-A-Payment” Mortg. Mktg. & Sales Pracs. Litig.</i>	
6	No. 5:09-md-02015 JF, 2011 WL 1877630 (N.D. Cal. May 17, 2011)	15
7	<i>Jaffe v. Morgan Stanley & Co., Inc.</i>	
	No. C-06-3903 TEH, 2008 WL 346417 (N.D. Cal. Feb. 7, 2008)	18
8	<i>Keithly v. Intelius Inc.</i>	
9	764 F. Supp. 2d 1257 (W.D. Wash. 2011)	2
10	<i>Lierboe v. State Farm Mut. Auto. Ins. Co.</i>	
	350 F.3d 1018 (9th Cir. 2003)	20
11	<i>Lundell v. Dell, Inc.</i>	
12	No. CIVA C05-3970 JWRS, 2006 WL 3507938 (N.D. Cal. Dec. 5, 2006)	21
13	<i>Nat’l Rural Telecomms. Coop. v. DIRECTV, Inc.</i>	
	221 F.R.D. 523 (C.D. Cal. 2004)	12
14	<i>Officers for Justice v. Civil Serv. Comm’n of the City and County of San Francisco</i>	
15	688 F.2d 615 (9th Cir. 1982), <i>cert. denied</i> , 459 U.S. 1217 (1983)	11, 12
16	<i>Rannis v. Recchia</i>	
	380 Fed. Appx. 646 (9th Cir. 2010)	19
17	<i>Rodriguez v. West Publishing Corp.</i>	
18	563 F.3d 948 (9th Cir. 2009)	14
19	<i>Singer v. Becton Dickinson and Co.</i>	
	08-cv-821-IEG (BLM), 2010 WL 2196104 (S.D. Cal. June 1, 2010)	15
20	<i>Williams v. MGM-Pathe Comm’n Co.</i>	
21	129 F.3d 1026 (9th Cir. 1997)	16
22	<i>Young v. Polo Retail, LLC</i>	
	No. C-02-4546 VRW, 2006 WL 3050861 (N.D. Cal. Oct. 25, 2006)	13
23	<i>Young v. Polo Retail, LLC</i>	
24	No. C-02-4546 VRW, 2007 WL 951821 (N.D. Cal. Mar. 28, 2007)	17
25	STATUTES	
26	15 U.S.C. § 1693, <i>et seq.</i>	3
	Cal. Bus. & Prof. Code § 17200 <i>et seq.</i>	3

Cal. Civ. Code § 1750, <i>et seq.</i>	3
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RULES

Fed. R. Civ. P. 23(a)	18, 19, 20
Fed. R. Civ. P. 23(a)(1)	18
Fed. R. Civ. P. 23(a)(2)	19
Fed. R. Civ. P. 23(b)	18
Fed. R. Civ. P. 23(b)(3)	18, 19
Fed. R. Civ. P. 23(c)(2)(B)	20
Fed. R. Civ. P. 23(e)(1)	20

TREATISES

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1 **I. INTRODUCTION**

2 Plaintiffs and proposed Class Representatives, Daniel Cox, Joseph M. Lynch, and
3 Nicole Hall, and Defendants, Clarus Marketing Group, LLC (“CMG”) and Provide Commerce,
4 Inc. have reached an agreement resolving all claims asserted in this action on a class-wide
5 basis.

6 This motion seeks preliminary approval of a settlement that will provide benefits to the
7 approximately 1.13 million Class members who, from February 16, 2007 to the present, placed
8 an order on a Provide Commerce website and were subsequently enrolled in
9 FreeShipping.com’s Insider’s Club or FreeShipping.com (collectively “FreeShipping.com”).
10 With an estimated value of more than ***\$2.65 million***, the proposed settlement provides
11 meaningful relief to all Class and Subclass members.

12 Specifically, the Class consists of approximately 1.3 million class members that
13 plaintiffs contend (and Defendants deny) were deceptively enrolled in FreeShipping.com, plus
14 a Subclass of approximately 130,000 additional class members that were enrolled and charged
15 fees by CMG despite the fact that they did not provide CMG with their credit or debit card
16 information (CMG obtained their billing information from Provide Commerce). The settlement
17 requires Defendants to establish a non-reversionary cash fund (“Settlement Fund”) of \$500,000
18 from which eligible Subclass members may claim a cash payment of non-reimbursed fees
19 charged by CMG. All Subclass members who do not assert a claim for a cash payment will
20 automatically receive a fully transferable merchandise credit for \$15 off online purchases at a
21 number of Provide Commerce websites (“\$15 Credit”). All other Class members will
22 automatically receive a fully transferable code for 20% off online purchases.

23 Each Class member will receive direct notice advising them of their rights under the
24 settlement, including their rights to opt out of the settlement, be heard by the Court, or receive a
25 20% Off Code or \$15 Credit or make a claim from the Settlement Fund, as applicable. This
26 will ensure that Class and Subclass members are fully informed and have ample opportunity to

1 participate or exclude themselves from the proposed settlement.

2 Overall, the proposed Settlement Agreement provides a fair resolution of hotly
3 contested claims and novel issues of law on which courts remain divided. Indeed, this case is
4 one of a handful of federal lawsuits challenging the online marketing practice of retailers
5 sharing consumers' billing information, including their debit and credit card numbers and home
6 addresses, for purposes of ongoing "reward club" type memberships.¹

7 Plaintiffs and Class Counsel vigorously litigated this case, and the similar *In re*
8 *EasySaver Rewards* case which has been heavily litigated for more three years. Only after a
9 full-day private mediation before the Hon. Edward A. Infante (Ret.) did they agree to the
10 proposed Settlement Agreement. For these reasons and those set forth in further detail below,
11 the proposed Settlement Agreement is fair and reasonable, serves the best interests of the Class
12 and Subclass members and is worthy of this Court's approval.

13 The parties seek an order from this Court: (a) preliminarily approving the proposed
14 settlement; (b) provisionally certifying the Class and Subclass and appointing Class
15 Representatives and appointing Class Counsel; (c) approving the proposed notice and
16 authorizing its dissemination; and (d) setting dates and procedures for the fairness hearing,
17 including deadlines for Class and Subclass members to object to or request exclusion from the
18 settlement.

19 **II. STATEMENT OF THE FACTS**

20 **A. Plaintiffs' Allegations.**

21 Plaintiffs' allegations are set forth in the Complaint.² In summary, they allege that
22

23 ¹ See *In re EasySaver Rewards Litig.*, 737 F. Supp. 2d 1159, 1172 (S.D. Cal. Aug. 13, 2010); *Berry v.*
24 *Webloyalty.com, Inc.*, No. 10-CV-1358-H (CAB), 2011 WL 1375665, at *14 (S.D. Cal. Apr. 11, 2011); *Keithly v.*
25 *Intelius Inc.*, 764 F. Supp. 2d 1257, 1267-69 (W.D. Wash. 2011); *Ferrington v. McAfee, Inc.*, No. 10-CV-01455-
26 *LHK*, 2010 WL 3910169, at *9-11 (N.D. Cal. Oct. 5, 2010); *In re VistaPrint Corp. Mktg. and Sales Practices*
Litig., MDL No. 4:08-md-1994, 2009 WL 2884727, at *12 (S.D. Tex. Aug. 31, 2009), *aff'd*; *Bott v. Vistaprint*
USA, Inc., 392 Fed. Appx. 327, 327-28 (5th Cir. Tex. 2010); *Baxter v. Intelius*, No. 09-1031 AG (MLGx), 2010
WL 3791487 (C.D. Cal. Sept. 16, 2010).

² Dkt. No. 1.

1 Defendants' prior practices of enrolling customers in FreeShipping.com are unfair and
2 unlawful. Specifically, when Class members completed an order on one of Provide
3 Commerce's retail websites, they were presented with a pop-up window offering free shipping
4 on their current order and free shipping rebates on 12 future Provide Commerce orders.
5 Plaintiffs contend that they were never told that they were no longer on the Provide Commerce
6 retail website or that they had been directed to a CMG interface. The Complaint asserts they
7 also were never informed that by accepting the "free" shipping offer, they were supposedly
8 "authorizing" CMG to charge their debit and credit cards monthly fees. To receive the
9 promotion, Subclass members were asked only to enter their zip code and email address and
10 click "Accept" to receive the promotion, while all other Class members were required to enter
11 additional information, including their billing address and credit card information. Plaintiffs
12 contend that as to Subclass members, Provide Commerce transmitted the Subclass members'
13 private payment information to CMG without consent. CMG proceeded to enroll Plaintiffs and
14 Class members in the FreeShipping.com service and charged their credit and debit cards fees
15 approximating \$9.00 to \$20.00 per month. Plaintiffs challenged Defendants' conduct as
16 violating the Racketeering Influenced and Corrupt Organizations Act ("RICO") (as to CMG
17 only), the Federal Electronic Funds Transfer Act ("EFTA") (as to CMG only), California
18 Consumers Legal Remedies Act ("CLRA"), Cal. Civ. Code § 1750, *et seq.*, California Unfair
19 Competition Law ("UCL"), Cal. Bus. & Prof. Code § 17200 *et seq.*, Connecticut Unfair Trade
20 Practices Act ("CUTPA") (as to CMG only), and Michigan Compiled Laws § 600.2919a,
21 alleged that the conduct constituted conversion, negligence, invasion of privacy, and invasion
22 of privacy under the California Constitution, and sought declaratory relief (as to CMG only).

23 Defendants deny Plaintiffs' allegations, contending that the FreeShipping.com program
24 details were adequately disclosed and that Plaintiffs entered into electronic contracts with CMG
25 for membership in FreeShipping.com. Defendants contend that Class members had to provide
26 CMG with, among other things, their billing address and payment details, which demonstrates

1 that they authorized the charges. As to Subclass members, Defendants contend that the
2 electronic contracts expressly authorized CMG to obtain Subclass members' billing and
3 payment information from Provide Commerce.

4 **B. Relevant Procedural History.**

5 On February 16, 2011, Plaintiff Daniel Cox and then-plaintiff Bradley Berentson
6 commenced a civil action in the United States District Court for the Northern District of
7 California entitled *Daniel Cox, et al. v. Clarus Marketing Group, LLC, et al.*, Case No. 11-cv-
8 0729-DMR. On March 24, 2011, the case was reassigned to the Honorable Sandra Brown
9 Armstrong.

10 On March 29, 2011, then-plaintiffs Mark McKnight and James Wilson filed a civil
11 action in the United States District Court for the Northern District of California entitled *Mark*
12 *McKnight, et al. v. Clarus Marketing Group, LLC, et al.*, Case No. 11-cv-1501-MEJ. On April
13 8, 2011, the case was reassigned to the Honorable Sandra Brown Armstrong.

14 On April 8, 2011, Plaintiff Nicole Hall filed a civil action in the United States District
15 Court for the Northern District of California entitled *Nicole Hall v. Clarus Marketing Group,*
16 *LLC, et al.*, Case No. 11-cv-1757-LB. On May 2, 2011, the case was reassigned to the
17 Honorable Sandra Brown Armstrong.

18 On April 20, 2011, Plaintiff Hall and then-plaintiffs McKnight and Wilson filed a
19 motion to consolidate the *Cox, McKnight*, and *Hall* actions.

20 On April 29, 2011, Plaintiff Joseph Lynch filed a civil action in the United States
21 District Court for the Southern District of California entitled *Joseph M. Lynch v. Clarus*
22 *Marketing Group, LLC, et al.*, Case No. 11-cv-0913-BEN (RBB). On May 4, 2011, Plaintiff
23 Lynch filed a notice of voluntary dismissal. On May 19, 2011, Plaintiff Cox filed an amended
24 complaint in the *Cox* action, which added Joseph Lynch as a new plaintiff and did not include
25 then-plaintiff Berentson.

26 On November 2, 2011, then-plaintiff Wilson filed a request for voluntary dismissal as to

1 himself in the *McKnight* action and, subsequently, on November 11, 2011, then-plaintiff
2 McKnight filed a notice of voluntary dismissal of the *McKnight* action.

3 On November 11, 2011, Plaintiff Hall filed a notice of voluntary dismissal of the *Hall*
4 action and on November 14, 2011, Plaintiffs Cox and Lynch filed a notice of voluntary
5 dismissal of the *Cox* action.

6 On November 18, 2011, Plaintiffs Cox, Hall, and Lynch filed an action in this Court
7 (Dkt. No. 1). On January 20, 2012, the action was reassigned to the Honorable Marilyn L.
8 Huff, with the case number updated to 11-cv-2711-H (RBB) to reflect reassignment.

9 On November 22, 2011, Defendants responded to Plaintiffs' informal discovery
10 requests, which were communicated to Defendants in an October 28, 2011 letter. Defendants
11 simultaneously produced documents to Plaintiffs' counsel along with their written responses to
12 the information requests in the context of a privileged mediation and settlement
13 communication.

14 On April 10, 2012, the parties participated in a full-day private mediation session before
15 Judge Edward A. Infante (Ret.). At the conclusion of the mediation, the parties reached an
16 agreement on the high-level terms of a settlement, conditioned on the parties negotiating and
17 executing a complete written agreement, which in turn is subject to court approval.

18 On May 25, 2012, Provide Commerce and CMG answered the complaint (Dkt. Nos. 13,
19 14). The answers generally and specifically denied the complaint's allegations and raised
20 several separate and additional defenses.

21 The parties continued to negotiate the remaining terms of the settlement, and on
22 October 2, 2012 they entered into the Settlement Agreement, which, as a class-wide settlement
23 is subject to Court approval.³

24 **C. Plaintiffs' Discovery Efforts.**

25 Plaintiffs have thoroughly investigated this case. Prior to filing the lawsuit, Plaintiffs

26 _____
³ Patterson Decl., ¶¶ 2-3.

1 conducted substantial research through public records and the Internet to verify the scope and
2 nature of the conduct alleged.⁴ After filing the lawsuit, Plaintiffs continued their investigation
3 through written discovery requests for certain categories of documents, including contracts
4 between Provide Commerce and CMG and copies of insurance agreements that might provide
5 coverage for Plaintiffs' claims, as well as data concerning the class size and revenues generated
6 through Defendants' practices. Defendants responded to plaintiffs' requests and produced
7 certain documents on November 22, 2011 in the context of a privileged and inadmissible
8 settlement and mediation communication, which were subsequently reviewed by Plaintiffs'
9 counsel.⁵

10 Importantly, proposed Class Counsel is also familiar with the underlying practices and
11 has heavily litigated the legal issues presented here in connection with a similar case against
12 defendant Provide Commerce that is also pending in the Southern District of California.⁶ The
13 *In re EasySaver Rewards* case challenges a different rewards program that utilized a similar
14 online enrollment process. That case has been heavily litigated by Class Counsel and Provide
15 Commerce's counsel for more than three years. Suffice to say, the parties have a strong handle
16 on the underlying legal issues and have sufficiently ferretted out their respective strengths and
17 weaknesses.

18 **D. Mediation and Settlement Negotiations.**

19 The parties prepared comprehensive mediation statements and participated in a full-day
20 private mediation session with a highly-respected mediator in order to settle this case.⁷ At the
21 conclusion of the mediation, the parties reached an agreement on the high-level terms of a
22 settlement, conditioned on the parties negotiating and executing a complete written agreement,
23

24 _____
⁴ Patterson Decl., ¶ 6 .

25 ⁵ Patterson Decl., ¶ 7.

26 ⁶ See *In re EasySaver Rewards Litig.*, 737 F. Supp. 2d 1159, 1172 (S.D. Cal. Aug. 13, 2010).

⁷ Patterson Decl., ¶ 2.

1 which in turn is subject to court approval.⁸ The parties continued to negotiate the details and
2 remaining terms of the proposed Settlement Agreement over the course of several weeks, and
3 the terms were memorialized in a negotiated memorandum of settlement.⁹

4 During the mediation and following settlement discussions, the parties engaged in
5 negotiations that were at all times adversarial, non-collusive, and at arm's length. *Id.* The
6 parties vigorously clashed over core issues such as the amount of the Settlement Fund, the full
7 amount and transferability of the 20% Off Code and \$15 Credit. *Id.* With Judge Infante's
8 assistance, those negotiations finally resulted in an agreement in principle.¹⁰

9 Throughout the negotiations, the parties considered factors such as the ongoing cost of
10 litigation, the potential damages, the risks of class certification and trial, and the possibility of
11 appeals following any judgment. Class Counsel believe that the proposed settlement is in the
12 Class' best interest.¹¹

13 **III. THE SETTLEMENT TERMS**

14 The details of the Settlement Agreement signed by the parties and attached to the
15 Patterson Declaration as Exhibit 1 are summarized below.

16 **A. The Settlement Class and Subclass.**

17 The proposed settlement Class consists of

18 All persons who, between February 16, 2007 and the date of
19 entry of the Preliminary Approval order, placed an order with a
20 website operated by Provide Commerce and were subsequently
21 enrolled in FreeShipping.com.¹²

22 The proposed settlement Subclass consists of

23 ⁸ Patterson Decl., ¶ 3 .

24 ⁹ Patterson Decl., ¶ 3.

25 ¹⁰ Patterson Decl., ¶ 3 .

26 ¹¹ Patterson Decl., ¶ 3.

¹² Patterson Decl., Ex. 1, Settlement Agreement, at 3..

1 All persons who, between April 1, 2009 and December 13, 2009,
2 placed an order with a website operated by Provide Commerce
3 and were subsequently enrolled in FreeShipping.com by entering
his or her email address and zip code (as opposed to additional
contact and billing information).

4 Excluded from the Class and Subclass are (a) Defendants, (b) any entities in which
5 Defendants have a controlling interest or which have a controlling interest in Defendants,
6 (c) the officers, directors, employees, subsidiaries, affiliates, and attorneys of Defendants, and
7 (d) the Judges presiding over this action and any of their employees or immediate family
8 members.¹³

9 **B. Relief to the Class and Subclass.**

10 In exchange for a release of claims and subject to this Court's approval, Defendants
11 have agreed that (1) they will, via The Garden City Group, Inc., a neutral professional claims
12 administrator, notify all Class members via direct email or U.S. Mail about their rights under
13 the Settlement Agreement.¹⁴ (2) After final approval, the claims administrator will directly
14 email every Class member who is not a Subclass member a 20% Off Code. No Class Member
15 will be required to submit a claim form to receive this code.¹⁵ (3) The claims administrator will
16 directly email every Subclass member who is not eligible or otherwise chooses not to make a
17 claim for a monetary payment from the Settlement Fund a \$15 Credit. The 20% Off Code and
18 \$15 Credit will be fully transferable and valid for one year for online purchases at
19 Proflowers.com, RedEnvelope.com, Berries.com and CherryMoonFarms.com.¹⁶ At the time of
20 settlement, Plaintiffs' counsel verified that these websites offered a selection of items under
21 \$15, but Subclass members may use the money towards larger purchases as well.¹⁷ And (4)
22 Defendants will fund a \$500,000 Settlement Fund that eligible Subclass members can make

23
24 ¹³ Patterson Decl., Ex. 1, Exhibit B ("Full Notice").

25 ¹⁴ Patterson Decl., Ex. 1, at 3, 8-9.

26 ¹⁵ Patterson Decl., Ex. 1, at 5.

¹⁶ Patterson Decl., Ex. 1, at 5-6.

¹⁷ Patterson Decl., ¶ 8.

1 claims against for payments for membership fees up to \$36.00.¹⁸

2 To make a claim from the Settlement Fund, Subclass members need only visit the
3 neutral Claims Administrator's website, a link to which is provided to them via the direct email
4 notice, and submit a Claim Form signed under penalty of perjury.¹⁹ Subclass members will be
5 required to submit their contact information and verify that they did not knowingly enroll and
6 use the benefits of the FreeShipping.com service.²⁰ Subclass members will *not* be required to
7 submit documents, or other proof of having been charged to make a claim.²¹ The Claims
8 Administrator will evaluate and calculate all claims for payment based upon Defendants'
9 records. Claims will be paid on a *pro rata* basis up to \$36.00.²² The parties must meet and
10 confer in good faith to resolve any disputed claims, with CMG's records being entitled to a
11 rebuttable presumption of accuracy.²³ The Settlement Fund is non-reversionary and any
12 remaining funds will be distributed as a *cy pres* award, subject to Court approval, to California
13 Western School of Law to fund a chair, professorship, fellowship, lectureship, seminar series,
14 or similar funding, gift, or donation program developed and coordinated between Provide
15 Commerce and California Western School of Law relating to internet privacy or internet data
16 security.²⁴

17 **C. Class Representatives' Incentive Payments.**

18 Each of the Class Representatives took the initiative to be named in the lawsuit, assisted
19 in the case investigations, stayed apprised of the litigation, and accepted substantial personal
20 risks and responsibilities on behalf of the Class.²⁵ Subject to Court approval, the Settlement

21 ¹⁸ Patterson Decl., Ex. 1, at 5-6

22 ¹⁹ Patterson Decl., Ex. 1, Exhibit C ("Summary Notice").

23 ²⁰ Patterson Decl., Ex. 1, Exhibit D ("Claim Form").

24 ²¹ Patterson Decl., Ex. 1, Exhibit D ("Claim Form").

25 ²² Patterson Decl., Ex. 1, Exhibit B.

26 ²³ See Patterson Decl., Ex. 1, at 10.

²⁴ Patterson Decl., Ex. 1, at 6.

²⁵ Patterson Decl., at 9.

1 Agreement provides for incentive awards of up to \$5,000 each for Class Representatives Cox,
2 Hall, and Lynch (for a total of up to \$15,000).²⁶ These awards are based on each Class
3 Representative's respective efforts and are designed to recognize these efforts and the personal
4 risks they undertook on behalf of the Class.

5 **D. Attorneys' Fees and Costs.**

6 The Settlement Agreement provides that Class Counsel may request a fees and costs
7 award of *up to* a total of \$640,000. This is reasonable and fair under well-settled Ninth Circuit
8 law. Class Counsel will file a detailed application for attorneys' fees and costs at least fourteen
9 (14) days before the objection deadline and prior to the fairness hearing.²⁷

10 **E. Settlement Administration and Notice.**

11 Class members will receive the Summary Notice via direct email or U.S. Mail within 60
12 days of this Court's entry of the preliminary approval order.²⁸ Where direct email notice fails or
13 "bounces back," the Claims Administrator will send a Summary Notice via postcard sent by
14 U.S. Mail within 74 days to each person to whom Summary Notice by direct email was not
15 deliverable and for whom CMG has a facially valid postal address.²⁹ Email notice will provide
16 class members with an electronic link to a website dedicated to the settlement and containing
17 Full Notice details.³⁰ The Summary and Full Notices include all the pertinent information
18 necessary for Class and Subclass members to make an informed decision about whether to
19 make a claim, object to the proposed settlement, or exclude themselves from the Class. The
20 Full Notice will also provide further detail of the relief provided by the settlement, the range of
21 fees and costs to be sought by Class Counsel, and the scope of the release and binding nature of
22 the settlement on Class members. *Id.*, Exhibit B. Class members may also download a copy of

23 ²⁶ Patterson Decl., Ex. 1, at 7.

24 ²⁷ Patterson Decl., Ex. 1, at 7.

25 ²⁸ Patterson Decl., Ex. 1, at 8.

26 ²⁹ Patterson Decl., Ex. 1, at 9.

³⁰ See Patterson Decl., Ex. 1, Exhibits B-C.

1 the Claim Form and Full Notice or request that a paper copy of the Claim Form and Full Notice
2 be sent via U.S. Mail.³¹

3 To make a claim for a payment from the Settlement Fund, Subclass members will only
4 be required to supply their contact information and verify that they did not knowingly enroll in
5 and use any of the benefits of FreeShipping.com.³² Using electronic records provided by CMG
6 the Claims Administrator will assess the validity of the claims and calculate the amounts owed.
7 The parties must meet and confer in good faith to resolve any disputed claims, with CMG's
8 records being entitled to a rebuttable presumption of accuracy.³³

9 **F. Objections and Opt-Out Procedures.**

10 To be excluded from the Class, a Class member must timely send a written request for
11 exclusion to the Claims Administrator at the address set forth in the Class Notice. The request
12 for exclusion must contain (a) the name of the Action, "*Daniel Cox, et al. v. Clarus Marketing*
13 *Group, LLC, et al.*"; (b) the Class member's full name, address, and telephone number; and (c)
14 a statement that he/she does not wish to participate in the settlement. All requests for exclusion
15 must be made as specified in the Class Notice and postmarked within 120 days after entry of
16 the Preliminary Approval Order.³⁴

17 Any Class member who does not submit a valid and timely request for exclusion to the
18 Claims Administrator may object to the settlement by filing a written objection with the Court
19 and delivering a copy of the objection to Class Counsel and Defendants' Counsel. The
20 objection must be postmarked by the deadline specified in the Class Notice (within 120 days
21 after entry of the Preliminary Approval Order), and must include (1) a heading containing the
22 name and case number of the Action: *Daniel Cox, et al. v. Clarus Marketing Group, LLC, et*
23 *al.*, Case No. 11-cv-2711-H (RBB); (2) the Class member's name, email address, postal

24 _____
³¹ Patterson Decl., Ex. 1, Exhibits C-D..

25 ³² Patterson Decl., Ex. 1, Exhibit D.

26 ³³ Patterson Decl. Ex. 1, at 10.

³⁴ Patterson Decl., Ex. 1, at 11.

1 address, and telephone number; (3) a detailed statement of each objection and the factual and
2 legal basis for each objection, and the relief that the Class member is requesting; (4) a list of
3 and copies of all documents or other exhibits which the Class member may seek to use at the
4 Fairness Hearing; and (5) a statement of whether the Class member intends to appear, either in
5 person or through counsel, at the Fairness Hearing, and if through counsel, a statement
6 identifying the counsel's name, postal address, phone number, email address, and the state
7 bar(s) to which the counsel is admitted.³⁵

8 **IV. ANALYSIS**

9 **A. The Law Favors Settlement.**

10 It is well established that settlements are the preferred means of dispute resolution,
11 particularly in class actions where substantial resources can be conserved by avoiding the time,
12 cost and rigor of prolonged litigation. In fact, “voluntary conciliation and settlement are the
13 preferred means of dispute resolution. This is especially true in complex class action
14 litigation....”³⁶ Further, the preference for settlement is evident in the Federal Rules of Civil
15 Procedure themselves.³⁷

16 Policies favoring settlement apply with particular force in this case, where more than a
17 million Class members across the country were charged fees in connection with
18 FreeShipping.com. The individual damages incurred vary, but the average out-of-pocket claim
19 is less than one hundred dollars per Class member. Given the very high costs of litigating a
20 consumer protection case against large and well-funded companies, Class members would have
21 no practical way to individually pursue their claims. Plus, individual litigations would clog the
22 courts and take years to resolve. The proposed settlement is the best and only means to ensure
23 that all Class members receive prompt and efficient relief.

24 ³⁵ Patterson Decl., Ex. 1, at 10.

25 ³⁶ See *Officers for Justice v. Civil Serv. Comm’n of the City and County of San Francisco*, 688 F.2d 615, 625 (9th
26 Cir. 1982), cert. denied, 459 U.S. 1217 (1983)).

³⁷ *In re Syncor ERISA Litig.*, 516 F.3d 1095, 1101 (9th Cir. 2008).

1 **B. The Preliminary Approval Process.**

2 Court approval of class action settlements is a two-step process: preliminary approval
3 and final approval. At the preliminary approval stage, the court must “make a preliminary
4 determination on the fairness, reasonableness, and adequacy of the settlement terms and must
5 direct the preparation of notice of the certification, proposed settlement, and date of the final
6 fairness hearing.”³⁸ The court must also make a preliminary determination whether the class
7 may be certified for settlement purposes under Rule 23.³⁹

8 After preliminary approval, notice of the proposed settlement is given to the class, and
9 the court conducts a final approval hearing, also known as a fairness hearing.⁴⁰ At the fairness
10 hearing, the court will consider arguments for and in opposition to approval of the settlement,
11 including comments submitted by class members in response to the class notice. The fairness
12 hearing, however, is not “a trial or rehearsal for trial on the merits.”⁴¹ “[T]he court’s intrusion
13 upon what is otherwise a private consensual agreement negotiated between the parties to a
14 lawsuit must be limited to the extent necessary to reach a reasoned judgment that the agreement
15 is not the product of fraud or overreaching by, or collusion between, the negotiating parties, and
16 that the settlement, taken as a whole, is fair, reasonable and adequate to all concerned.”⁴²

17 While the parties certainly believe that this settlement meets all the criteria for final
18 approval, at this juncture, they ask only that the Court take the first step in the process and grant
19 preliminary approval of the settlement.

20 **C. The Settlement Should Be Preliminarily Approved.**

21 At this preliminary approval stage, the Court need only “determine whether the
22
23

24 ³⁸ *Manual for Complex Litigation, (Fourth)* (“MCL 4th”) § 21.632 (2004).

25 ³⁹ *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 620-21 (1997).

26 ⁴⁰ *Nat’l Rural Telecomms. Coop. v. DIRECTV, Inc.*, 221 F.R.D. 523, 525 (C.D. Cal. 2004).

⁴¹ *Officers for Justice*, 688 F.2d at 625.

⁴² *Id.*

1 proposed settlement is within the range of possible approval.”⁴³ So if the proposed settlement
2 “appears to be the product of serious, informed, non-collusive negotiations, has no obvious
3 deficiencies, does not improperly grant preferential treatment to class representatives or
4 segments of the class, and falls within the range of possible approval, then the court should
5 direct that the notice be given to the class members of a formal fairness hearing . . .”⁴⁴

6 In determining whether a settlement falls within the range of possible approval, courts
7 consider whether the negotiations occurred at arm’s length, whether sufficient discovery or
8 investigation took place, and whether the proponents of the settlement are experienced in
9 similar litigation.⁴⁵ Considering the settlement efforts in this case, these criteria are
10 unquestionably satisfied.

11 **1. The Settlement Enjoys a Presumption of Fairness Because the**
12 **Negotiations Were Conducted at Arm’s Length.**

13 The settlement is presumptively fair because there is nothing to suggest collusion
14 between the parties. On the contrary, all material terms of the Settlement Agreement were
15 reached after adversarial settlement discussions and a private mediation session conducted by a
16 highly regarded and experienced mediator, Judge Infante.⁴⁶ The fact that mediation was
17 overseen by a neutral third party evidences the non-collusive nature of the negotiations.⁴⁷

18 **2. Counsel’s Discovery Efforts.**

19 Plaintiffs’ counsel’s discovery efforts began before the lawsuits were even filed and
20 have been ongoing through over a year of litigation. Counsel’s investigation includes extensive

21 ⁴³ *Alberto v. GMRI, Inc.*, 252 F.R.D. 652, 666 (E.D. Cal. 2008) (citing *Gautreaux v. Pierce*, 690 F.2d 616, 621 n.3
22 (7th Cir.1982)).

23 ⁴⁴ *Young v. Polo Retail, LLC*, No. C-02-4546 VRW, 2006 WL 3050861, at *5 (N.D. Cal. Oct. 25, 2006) (citing
24 *Manual for Complex Litigation*, § 30.44 (2nd ed. 1985)).

25 ⁴⁵ See Alba Conte & Herbert B. Newberg, 2 *Newberg on Class Actions*, § 11.41 (4th ed. 2002).

26 ⁴⁶ See also Section II.D., *supra*.

⁴⁷ See, e.g., *In Re HP Laser Printer Litig.*, No. SACV 07-0667 AG (RNBx), 2011 WL 3861703, at *4 (C.D. Cal.
Aug 31, 2011) (finding the fact that the parties appeared before a neutral third party mediator evidence supporting
a finding that there was no collusion between the parties in reaching settlement).

1 online research, requests for responses to written questions and two categories of documents
2 from Provide Commerce and CMG, and reviewing and analyzing documents and information
3 produced by the Defendants.⁴⁸

4 **3. The Settlement Suffers From No Obvious Deficiencies.**

5 The settlement has no “obvious deficiencies” and confers substantial benefits to Class
6 members, as set forth in greater detail above. In sum, as many as 1.13 million Class members
7 who were enrolled in FreeShipping.com will be given either (i) a fully transferable 20% Off
8 Code to use on certain Provide Commerce websites, (ii) a fully transferable \$15 Credit to use
9 on certain Provide Commerce websites, or (iii) the opportunity to submit a claim to receive a
10 cash payment for monthly fees charged for FreeShipping.com, up to \$36.00. Given the
11 substantial nature of the relief and the uncertainties of protracted litigation, the settlement is
12 unquestionably well within the range of possible approval.

13 **4. The Incentive Awards Are Reasonable.**

14 The proposed Class Representative incentive awards are fair and reasonable. As the
15 Ninth Circuit has observed:

16 Incentive awards are fairly typical in class action cases. Such
17 awards are discretionary, and are intended to compensate class
18 representatives for work done on behalf of the class, to make up
19 for financial or reputational risk undertaken in bringing the
20 action, and, sometimes, to recognize their willingness to act as a
21 private attorney general. Awards are generally sought after a
22 settlement or verdict has been achieved.⁴⁹

23 The parties have agreed that the Class Representatives may seek incentive awards of up
24 to \$5,000 each (for a total of up to \$15,000). Class Representatives Cox, Hall and Lynch were
25 willing to make the personal sacrifices associated with being a named plaintiff in a federal
26 lawsuit for the good of the Class. Each of the Class Representatives took the initiative to be
named in lawsuit, assisted in the case investigations, consulted with Class Counsel, and

⁴⁸ See also Section II.C, *supra*.

⁴⁹ *Rodriguez v. West Publishing Corp.*, 563 F.3d 948, 958-59 (9th Cir. 2009) (emphasis and citations omitted).

1 accepted substantial personal risks and responsibilities on behalf of the Class.⁵⁰

2 The amounts sought are reasonable in light of these circumstances, and Defendants do
3 not object to these amounts.⁵¹

4 **5. The Attorneys' Fees And Costs Are Reasonable.**

5 Considering the excellent value of the settlement, the benefits conferred on the Class,
6 and Class Counsel's knowledge and experience, the attorneys' fees and costs are reasonable.
7 Class Counsel achieved an excellent settlement while ultimately avoiding the uncertainties and
8 risks of contested class certification and trial. Throughout this litigation, Class Counsel has
9 dedicated substantial time and resources litigating the case and will continue to expend
10 significant amounts of time through the settlement and claims process.⁵² Class Counsel will
11 file a separate and more detailed motion for an award of attorneys' fees and costs at least
12 fourteen (14) days prior to the deadline for objections by Class members and in advance of the
13 fairness hearing. For purposes of preliminary approval, the Court is only being asked to
14 determine whether the Settlement Agreement's provision allowing Class Counsel to *request up*
15 *to* the stated amount should be preliminary approved.

16 The Settlement Agreement provides and the parties have agreed that Class Counsel may
17 apply to the Court for a fees and costs award not to exceed \$640,000.⁵³ The *maximum* fees
18 constitute less than twenty-five percent of the total value of the settlement, which is low for the
19 Ninth Circuit where many courts award fees in excess of the twenty-five percent federal
20

21

⁵⁰ Patterson Decl., ¶ 9.

22 ⁵¹ See, e.g., *In re TFT-LCD (Flat Panel) Antitrust Litig.*, No. 3:07-md-1827 SI, 2011 WL 7575003, at *2 (N.D.
23 Cal. Dec. 27, 2011) (approving \$15,000 incentive awards for 11 class representatives "in recognition of their work
24 performed for the benefit of the Class and the risks undertaken"); *In re Wachovia Corp. "Pick-A-Payment" Mortg.*
25 *Mktg. & Sales Pracs. Litig.*, No. 5:09-md-02015 JF, 2011 WL 1877630, at *7 (N.D. Cal. May 17, 2011)
(approving class representative incentive awards ranging from \$2,500 to \$14,250 each); *Singer v. Becton*
Dickinson and Co., No. 08-cv-821-IEG (BLM), 2010 WL 2196104, at *9 (S.D. Cal. June 1, 2010) (finding class
representative award of \$25,000 reasonable).

26 ⁵² See Patterson Decl., ¶¶ 6-7.

⁵³ Patterson Decl., Ex. 1, at 7.

1 benchmark.⁵⁴ “[A]bsent extraordinary circumstances that suggest reasons to lower or increase
2 the percentage, the rate should be set at 30%,” reasoning that this will “encourage plaintiffs’
3 attorneys to move for early settlement, provide predictability for the attorneys and the class
4 members, and reduce the time consumed by counsel and court in dealing with voluminous fee
5 petitions.”⁵⁵

6 While the total value of the benefits obtained on behalf of the Class is estimated to
7 exceed \$2.65 million, for the purposes of calculating fees based on the common fund approach,
8 Plaintiffs did not attribute any monetary value at all to the 20% Off Codes and conservatively
9 discounted the value of the \$15 Credits to 85 percent of their \$15 face value, which is
10 reasonable and supported by fee orders from other district courts in this Circuit. For example,
11 the California Central District in *Fernandez v. Victoria Secret Stores, LLC* valued merchandise
12 codes in settlement at 85 percent of face value, noting that the cards were fully transferrable
13 and that class members would likely use the cards themselves. Similarly, the California
14 Northern District in *Young v. Polo Retail, LLC*, found that the cash value of merchandise codes
15 in a settlement to be 80-85 percent of face value.⁵⁶

16 As in *Fernandez* and *Young*, the 20% Off Code and \$15 Credit here are fully
17 transferable. Under applicable case law, they have independent value to the Class. Class
18 members are also very likely to use the 20% Off Code and \$15 Credit themselves since many
19 Class members continue to be customers of Provide Commerce, and because, indeed, Class
20 members have already demonstrated an interest in receiving free shipping on future purchases
21 from Provide Commerce’s sites. Importantly, the conditions of this settlement are considerably

22
23 ⁵⁴ See, e.g., *In re Pac. Enter. Sec. Litig.*, 47 F.3d 373, 379 (9th Cir. 1995) (33% fee award); *Williams v. MGM-*
24 *Pathe Comm’n Co.*, 129 F.3d 1026, 1027 (9th Cir. 1997) (one-third of total fund awarded); see also *In re*
Activision Sec. Litig., 723 F. Supp. 1373, 1375 (N.D. Cal. 1989) (noting that fee awards in common fund cases
“almost always hovers around 30% of the fund created by the settlement”).

25 ⁵⁵ *In re Activision Sec. Litig.*, 723 F. Supp. at 1378-79.

26 ⁵⁶ See, e.g., *Fernandez v. Victoria Secret Stores, LLC*, No. CV 06-04149 MMM (SHx), 2008 WL 8150856, at *6,
10-11 (C.D. Cal. Jul. 21, 2008) (); *Young v. Polo Retail, LLC*, Case No. C-02-4546 VRW, 2007 WL 951821, at *4
(N.D. Cal. Mar. 28, 2007) ().

1 more favorable than *Fernandez* and *Young* because Class and Subclass members will
2 ***automatically*** receive the 20% Off Code or \$15 Credit, respectively, without being required to
3 submit a claim. By contrast, in *Fernandez* and *Young*, where the court awarded class counsel
4 **34%** and **31%** of the discounted value of the settlement, respectively, class members were
5 required to submit claims to receive any benefit at all.⁵⁷ In those cases, the amount of
6 merchandise codes that were actually distributed was drastically less than the amount being
7 made available, which was used to calculate the percentage of fees awarded.

8 Again, at this juncture Class Counsel has not yet requested a specific fee award so the
9 Court is merely being asked to approve the right to do so as set forth in the Settlement
10 Agreement.

11 **6. The Proponents of the Settlement Are Experienced in Similar**
12 **Litigation.**

13 Proposed Class Counsel have extensive experience in prosecuting complex class
14 actions, including cases involving consumer fraud.⁵⁸ With their combined breadth and depth
15 of experience, there can be no doubt that Class Counsel are qualified to conduct the litigation.
16 Likewise, Defendants' counsel are well versed in complex class action and are highly qualified
17 defense counsel. Accordingly, the parties are well-suited to make informed judgments
18 regarding the nature of the Settlement.

19 **7. The Proposed Settlement Class Warrants Certification.**

20 In the context of granting preliminary approval of the Settlement, this Court must also
21 determine that the proposed Class is certifiable.⁵⁹ Certification is warranted where, as here, it
22 is demonstrated that the four prerequisites of Rule 23(a), numerosity, commonality, typicality,
23 and adequacy of representation, and one of the three requirements of Rule 23(b), are satisfied.

24
25 ⁵⁷ See *Fernandez*, 2008 WL 8150856, at *16; *Young*, 2007 WL 951821, at *5.

26 ⁵⁸ Patterson Decl., Exs. 2-5.

⁵⁹ See *MCL 4th*, § 21.632; *Amchem*, 521 U.S. at 620.

1 ⁶⁰ Certification of a class action for damages requires a showing that “questions of law and fact
2 common to the members of the class predominate over any questions affecting only individual
3 members, and that a class action is superior to other available methods for the fair and efficient
4 adjudication of the controversy.” ⁶¹ Given that the Class will be certified for the purposes of
5 settlement only, the Rule 23(b)(3) requirement of superiority need not be met here because
6 manageability issues are not a bar to certification “for the proposal is that there be no trial.”
7 *Amchem*, 521 U.S. at 620.

8 Plaintiffs propose that the Court provisionally certify this action as a class action
9 pursuant to Rule 23 for the purpose of settlement. Such provisional certification is considered
10 an appropriate device in the settlement of class actions where the agreement to settle the case
11 occurs before certification. ⁶² Under the circumstances, there is more than a sufficient factual
12 basis for the Court to provisionally certify this action as a class action for the purposes of
13 settlement and to appoint Plaintiffs’ Co-Counsel as Class Counsel.

14 With respect to numerosity, Rule 23(a)(1) requires that the class be so numerous that
15 joinder of all members is impracticable. ⁶³ Here, more than a million consumers were enrolled
16 in the allegedly deceptive FreeShipping.com service. By any measure, the numerosity
17 requirement is met. While it is true that on the low end, the Supreme Court has indicated that a
18 class of 15 “would be too small to meet the numerosity requirement,”⁶⁴ the Ninth Circuit
19 recently upheld a class of only 20 persons.⁶⁵

20 Rule 23(a)(2) requires that the court find that “there are questions of law or fact
21

22 ⁶⁰ See Fed. R. Civ. P. 23.

23 ⁶¹ Fed. R. Civ. P. 23(b)(3).

24 ⁶² See, e.g., *Jaffe v. Morgan Stanley & Co., Inc.*, No. C-06-3903 TEH, 2008 WL 346417, at *2-3 (N.D. Cal. Feb. 7, 2008); *In re Portal Software, Inc. Sec. Litig.*, No. C-03-5138 VRW, 2007 WL 1991529, at *2-3 (N.D. Cal. Jun. 30, 2007).

25 ⁶³ Fed. R. Civ. P. 23(a)(1).

26 ⁶⁴ *Gen. Tel. Co. of the Nw., Inc. v. EEOC*, 446 U.S. 318, 330 (1980).

⁶⁵ *Rannis v. Recchia*, 380 Fed. Appx. 646, 650-51 (9th Cir. 2010).

1 common to the class.”⁶⁶ But the requirement is permissive: “[t]he existence of shared legal
2 issues with divergent factual predicates is sufficient, as is a common core of salient facts
3 coupled with disparate legal remedies within the class.”⁶⁷ Rule 23(b)(3) certification is proper
4 because the predominance and superiority requirements of that prong of Rule 23 are satisfied as
5 well.⁶⁸

6 Here, common questions of law and fact exist and predominate (as required by Rule
7 23(b)(3)) over any individual questions, including, *inter alia*:

- 8 1. Whether Class members can lawfully authorize an online retailer like Provide
9 Commerce to transfer their credit card or debit card information to CMG by
providing their email address and zip code on an internet form;
- 10 2. Whether Class members can lawfully authorize CMG to bill their credit and debit
11 cards by providing their email address and zip code;
- 12 3. Whether an email address and/or zip code on a web page constitutes a “written
authorization” under the EFTA;
- 13 4. Whether CMG was required under the EFTA to provide debit card Subclass
14 members with a copy of their purported written authorization to begin charging their
debit cards and whether CMG provided such copies;
- 15 5. Whether Class members were enrolled in FreeShipping.com;
- 16 6. Whether Class members’ billing information was obtained by CMG without
17 consent;
- 18 7. Whether Defendants engaged in conversion;
- 19 8. Whether Defendants were unjustly enriched;
- 20 9. Whether Defendants breached Plaintiffs’ and Class members’ privacy rights by
transmitting their private payment information;
- 21 10. Whether Defendants engaged in negligence or unfair or unlawful business practices;
- 22 11. Whether Defendants’ contracts, agreements, or policies contained unconscionable
23 terms;

24 ⁶⁶ Fed. R. Civ. P. 23(a)(2).

25 ⁶⁷ *Hanlon*, 150 F.3d at 1019.

26 ⁶⁸ *See* Fed. R. Civ. P. 23(b)(3); *Hanlon*, 150 F.3d at 1022 (“The Rule 23(b)(3) predominance inquiry tests whether
proposed classes are sufficiently cohesive to warrant adjudication by representation.”).

1 **12.** Whether CMG violated the EFTA;

2 **13.** Whether Defendants violated the CLRA; (16) whether Defendants violated the
3 UCL;

4 **14.** Whether CMG violated the CUTPA;

5 **15.** Whether Defendants violated Michigan Compiled Laws § 600.2919a; and

6 **16.** Whether Plaintiffs and Class members are entitled to relief and the appropriate
7 measure of damages.

8 Where, as here, Defendants' liability would be determined primarily by looking at their
9 uniform policies and practices, websites and code, the common questions in this litigation will
10 predominate over any individual issues.

11 Plaintiffs also meet the typicality requirement of Rule 23(a). All Plaintiffs, like all
12 Class members, were enrolled in FreeShipping.com after having ordered a product on a Provide
13 Commerce website. All Plaintiffs assert the similar or identical legal claims as all Class
14 members.

15 With respect to the adequacy of representation requirement of Rule 23(a), the named
16 plaintiffs must not have interests antagonistic to those of the class, and the plaintiffs' attorneys
17 must be qualified, experienced, and generally able to conduct the litigation.⁶⁹ As discussed
18 above, Class Counsel are exceptionally well qualified, experienced and able to conduct the
19 litigation. In addition, the Class Representatives' interests are co-extensive with those of the
20 Class, since each Class Representative and every Class member has been injured in the same
21 manner by Defendants, and Plaintiffs seek relief that is identical to that which is sought by
22 every other member of the Class.⁷⁰

23 Having volunteered to serve as representatives for the Class, Plaintiffs have taken a
24 leadership role in the litigation, performed and stood ready to perform any number of tasks, and
25 demonstrated a commitment to bringing about the best results possible for their fellow Class

26 ⁶⁹ See *Hanlon*, 150 F.3d at 1020.

⁷⁰ See *Lierboe v. State Farm Mut. Auto. Ins. Co.*, 350 F.3d 1018, 1022 (9th Cir. 2003) (finding that plaintiffs must
 have been injured themselves, not merely represent injured parties).

1 members. Moreover, Plaintiffs and Class Counsel have no interests antagonistic to those of the
2 Class and are not subject to any unique defenses. Plaintiffs and Class Counsel have and will
3 continue to fairly and adequately protect the interests of the Class.

4 **D. The Proposed Form And Method Of Class Notice Satisfies Due Process.**

5 Rule 23(e)(1) of the Federal Rules of Civil Procedure provides that “[t]he court must
6 direct notice in a reasonable manner to all class members who would be bound by the
7 proposal.” Rule 23 further requires “the best notice practicable under the circumstances,
8 including individual notice to all members who can be identified through reasonable effort.”⁷¹

9 Here, the parties have agreed to provide direct email notice of the settlement to all Class
10 members, provide supplemental notice by U.S. Mail where emails are no longer valid, and
11 provide information via a website created for the settlement managed by the Claims
12 Administrator.⁷² Where, as here, Class members provided their email addresses to Defendants
13 in connection with their original transactions, such notice more than satisfied notice and due
14 process requirements.⁷³

15 The Summary Notice⁷⁴ will be sent to all Class members via email or, alternatively, via
16 postcard by U.S. Mail in the event the email is undeliverable. Class members can then access
17 the Full Notice⁷⁵ and Claim Form⁷⁶ on a website established and maintained by the Claims
18 Administrator. Class members may also download the Full Notice and Claim Form or request
19 that a paper copy of the Full Notice and Claim Form be sent via U.S. Mail.⁷⁷

20 ⁷¹ See Fed. R. Civ. P. 23(c)(2)(B).

21 ⁷² Patterson Decl., Ex. 1, at 8-9.

22 ⁷³ See, e.g., *Browning v. Yahoo! Inc.*, No. C04-01463 HRL, 2007 WL 4105971, at *4 (N.D. Cal. Nov. 16, 2007)
23 (finding email notice particularly appropriate in case where class members’ claims arise from their visits to
24 defendants’ websites) (citing *Lundell v. Dell, Inc.*, No. CIVA C05-3970 JWRS, 2006 WL 3507938, at *1 (N.D.
Cal. Dec. 5, 2006) (finding direct email notice best practicable notice)).

25 ⁷⁴ Patterson Decl., Ex. 1, Exhibit C.

26 ⁷⁵ Patterson Decl., Ex. 1 Exhibit B.

⁷⁶ Patterson Decl. Ex. 1, Exhibit D.

⁷⁷ Patterson Decl., Ex. 1, Exhibit C.

1 The Full and Summary Notices were collaboratively written by the parties, and are
2 written in plain English. Moreover, the Full and Summary Notices clearly provide information
3 to Class members about the benefits of the settlement, how to be excluded from the Class or
4 object to the settlement, and how Class members' legal rights are affected by remaining in or
5 opting out of the Class.

6 For the reasons set forth above, the notice plan agreed to in the settlement is the best
7 notice practicable and affords Class members with all due process protections required by Rule
8 23. As such, the Full and Summary Notices and notice plan should be approved.

9 **V. CONCLUSION**

10 For all of the foregoing reasons, the Plaintiffs respectfully request that this Court grant
11 this motion in its entirety consistent with the [Proposed] Order Granting Preliminary Approval
12 of Class Action Settlement, Approval of Form Notice and Preliminary Certification of
13 Settlement Class submitted herewith.

14
15 Dated: October 12, 2012

PATTERSON LAW GROUP

16 By: /s/ James R. Patterson
17 James R. Patterson

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*Plaintiffs' Co-Counsel and Proposed Class
Counsel*

CERTIFICATE OF SERVICE

I, James R. Patterson, hereby certify that on October 12, 2012, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to all counsel of record registered with the CM/ECF system.

Dated: October 12, 2012

PATTERSON LAW GROUP

By: /s/ James R. Patterson
James R. Patterson

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